STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

In the Matter of:

SHELBY TOWNSHIP,

Respondent/Appellant,

MSC Case No.: 153074
COA Case No.: 323491
MERC Case No.: C12 D-067

-and-

COMMAND OFFICERS ASSOCIATION OF MICHIGAN,

Charging Party/Appellee.

_____/

APPELLANT SHELBY TOWNSHIP'S REPLY BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

KIRK, HUTH, LANGE & BADALAMENTI, PLC

CRAIG W. LANGE (P27200)
ROBERT T. CAROLLO, JR. (P76542)
RYAN J. L. FANTUZZI (P79616)
Attorneys for Respondent/Appellant
19500 Hall Road, Suite 100
Clinton Township, MI 48038
(586) 412-4900

Dated: June 14, 2017

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

INTRODUCTION

The Union's reliance on authorities holding that the Public Employment Relations Act ("PERA"), MCL 423.201 *et seq*., supersedes other statutes, such as The Publicly Funded Health Insurance Contribution Act ("Act 152"), 2011 PA 152 as amended, MCL 15.561 *et seq*., on the mere basis of being rooted in Const 1963, art. 4, § 48 is misplaced.[1] PERA and Act 152 stand on the same footing under the Michigan Constitution.

Under Const 1963, art. 4, § 49, the Legislature has express authority to enact laws "relative to the hours and *conditions* of employment." *See W Michigan Univ Bd of Control v State*, 455 Mich 531, 536; 565 NW2d 828 (1997). Act 152 sets certain limits on the maximum amount a public employer can contribute to an employee's health care costs. Thus, by its plain language, Act 152 is a law affecting a condition of employment under Const 1963, art. 4, § 49.[2]

The Union incorrectly argues that Act 152 and PERA must be read *in pari materia* and "harmonized." The Michigan Employment Relations Commission ("MERC") agrees that Act 152 and PERA have different aims and purposes such that they cannot be read *in pari materia*.

Moreover, there is no way to harmonize MCL 15.564(2)'s "as it sees fit" language with collective bargaining. Collective bargaining presumptively requires parties to meet and "negotiate" in good faith.[3] Under the Union's interpretation, labor organizations eligible for Act

---

[1] *Union Brief on Appeal at p. 16*, citing *Rockwell v Bd of Ed of Sch Dist of Crestwood*, 393 Mich 616, 630; 227 NW2d 736 (1975). *Rockwell* is consistently cited when courts or parties assert PERA "dominance" or "supremacy."

[2] *Straus v Governor*, 459 Mich 526, 533; 592 NW2d 53 (1999) ("Where, as here, there is a claim that two different provisions of the constitution collide, we must seek a construction that harmonizes them both. This is so because, both having been adopted simultaneously, neither can logically trump the other.").

[3] In fact, PERA precludes employers, generally, from unilaterally imposing any term or condition of employment without first undertaking collective bargaining. *Macomb Co v AFSCME Council 25*, 494 Mich 65, 79; 833 NW2d 225 (2013) ("While the parties do not need to reach an agreement on a subject of mandatory collective bargaining, 'neither party may take unilateral action on the subject absent an impasse in the negotiations.'") (citation omitted).

312's binding arbitration process[4] such as the Union could have an Act 152 decision made by an arbitrator, thus completely eliminating the public employer's statutory rights. By using the language "as it sees fit" in Sections 3 and 4 of Act 152, the Legislature provided a clear and unequivocal mandate to negate *mandatory* collective bargaining under Act 152 or subjecting such issues to Act 312 binding arbitration.[5]

The Township is not arguing that the allocation of costs under Act 152 can never be bargained;[6] only that the discretion afforded the employer under Sections 3 and 4 of Act 152 renders the allocation of costs a *permissive* subject of bargaining. This provides flexibility to public employers to leverage the possibility of bargaining over the cost allocation with their bargaining units while avoiding the rigid penalties of MCL 15.569 or Act 312 binding arbitration. *See Township's Brief on Appeal at p. 23, n. 14.* Certainly, the analogy offered by the Union at p. 14 of its Brief applies with equal vigor to its own position. If the allocation of the percentage of medical benefit costs is subject to mandatory bargaining, a bargaining unit such as the Union could negotiate or be awarded through Act 312 binding arbitration a percentage share less than 20%, thus requiring the difference to be made up by a public employer's other unions. Such a result renders "good faith" bargaining impossible.[7]

As to the second issue on appeal, whether Act 152, alone or in conjunction with PERA, precludes the use of illustrative rates including retirees' claim experience, the Union's argument is mis-focused. Act 152 is solely concerned with limiting public employer expenditures on

[4] See MCL 423.231, *et seq.*

[5] Act 312 binding arbitration applies only to mandatory subjects of bargaining, not permissive subjects.

[6] The Union at p. 3 of its Brief incorrectly asserts that the Township refused to bargain in this case. MERC specifically reversed the ALJ's finding on this issue and held that the Township **did not refuse to bargain** in this case. (**JA 309a**).

[7] The Amicus Brief filed by the Michigan Municipal League ("MML") provides two (2) very clear examples of the pitfalls associated with Act 312 binding arbitration over Act 152 issues. *MML Amicus Brief, pp. 13-15.*

employee health care. The Union's argument that employees may be forced to subsidize retiree health care costs is outside the scope of Act 152 as Act 152 does not place any actual limit on employee expenditures for health care. Moreover, the Union offers no argument, and, in fact, concedes that PERA is silent as to the use of illustrative rates including retirees' claim experience. It was error for MERC and the court of appeals to impose an unfair labor practice in this case, especially where the Department of Treasury has approved such a practice.

The final issue concerns MERC's holding that the Township committed an unfair labor practice by not unilaterally altering a mandatory subject of bargaining.[8] While the Union is correct that this Court did not specifically request briefing on this issue, the Court's February 3, 2017 Order was open-ended stating, "[t]he parties shall include *among* the issues to be briefed . . . ." The use of the preposition "among" demonstrates that the Court permitted briefing beyond the two specified issues.

The Union incorrectly attempts to re-frame this issue as a dispute over the calculation of rates. That is the not the error identified by the Township. MERC certainly had remedial authority to order the Township to recalculate its illustrative rates and credit the Union's members for any overpayment. What MERC does not have is the power to re-write the labor law precedents of this Court. This is what occurred, however, when MERC held that the Township's failure to unilaterally recalculate and implement a draft unbundled illustrative rate – a mandatory subject of bargaining according to MERC – constituted an unfair labor practice. This creates a legal paradox where, under well settled labor law precedent, the Township also commits an

[8] The Township disputes that these subjects are mandatory subjects of bargaining as discussed herein, but for the purpose of this sub-section, it assumes for the sake of argument that it was required to bargain over the calculation methodology associated with the illustrative rates it received from Blue Cross.

unfair labor practice if it takes any unilateral action regarding a mandatory subject of bargaining. This Court consistently overturns such erroneous and paradoxical rulings.

ARGUMENT

I. Act 152 and the PERA cannot be read *in pari materia* and Act 152 controls under general canons of statutory construction.

The Union concludes without analysis that the doctrine of *in pari materia* applies to the relationship between Act 152 and PERA. This conclusion is incorrect. Under the doctrine of *in pari materia*, statutes that relate to the same subject or that share a common purpose should, if possible, be read together to create a harmonious body of law. *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007). But an act that incidentally refers to the same subject matter is not *in pari materia* if its scope and aim are distinct and unconnected. *People v Mazur*, 497 Mich 302, 313; 872 NW2d 201 (2015).

This Court has rejected the use of the *in pari materia* doctrine on several relevant occasions. In *Mazur*, this Court held that the court of appeals incorrectly attempted to harmonize the Michigan Medical Marihuana Act and the Offenses and Penalties provisions of the Controlled Substances article of the Public Health Code where the statutes stood in direct opposition as to the same subject matter. *Mazur*, 497 Mich at 313–14 (reasoning that the MMMA was enacted to permit the limited use of marihuana whereas the Offenses and Penalties sought to criminalize the use of marihuana). Similarly, in *People v Feeley*, 499 Mich 429, 443; 885 NW2d 223 (2016), this Court held that the resisting and obstructing statute of the Michigan Penal Code and the Michigan Commission on Law Enforcement Standards ("MCOLES") Act could not be read *in pari materia* in order to import the definition of "police officer" from MCOLES to the Penal Code. The Court reasoned that despite the fact that both statutes involved

the same subject matter – police officers – the purpose and aim of each statute was far too different to be harmonized. *Id*.

There is no difference in this case. At best, the statutes are incidentally connected where employee health care costs are, traditionally, a term and condition of employment under MCL 423.215(1). Similar to *Mazur* and *Feeley*, however, the connection ceases at that point – the statutes do not share a common purpose and are grounded in different constitutional provisions. Here, Act 152 imposes expenditure limitations on public employer payments toward their employee's health care costs. MCL 15.563 and 15.564. Historically, under PERA, the limitations a public employer must impose under Act 152 could not have been implemented unilaterally. Such unilateral action would have constituted an unfair labor practice under PERA. Act 152 changed that paradigm. The statutes are squarely at odds.

MERC agrees that Act 152 and PERA are not to be read *in pari materia*. In *Decatur Public Schools, Public Employer-Respondent, and Van Buren County Education Association, Labor Organization-Charging Party*, 27 MPER ¶ 41 (2014), MERC held:[9]

> We do not agree that PERA and PA 152 are to be read *in pari materia*. Although both statutes may have bearing on certain benefits provided by public employers to their employees as compensation, the commonality ends there. PERA sets forth the circumstances under which public employers must bargain with the representatives of their employees over compensation and other terms and conditions of employment. PA 152 specifically addresses public employers' costs for one type of compensation-health insurance— and sets limits on the amounts that public employers may pay. With the exception of granting an exemption to its requirements for public employers subject to collective bargaining agreements in effect when PA 152 was passed, PA 152 does not address collective bargaining. Its provisions are simply designed to limit the total amounts public employers may pay for health care costs. See House Fiscal Agency Legislative Analysis,

[9] *See also West Iron County Public Schools, Public Employer-Respondent, and West Iron County Educational Support Personnel Association, Labor Organization-Charging Party*, 28 MPER ¶ 46 (2014).

> Senate Bill 7 (as reported from Conference Committee), August 23, 2011, and Senate Fiscal Agency Analysis, Senate Bill 7 (Substitute H-6, Conference Report-1 as adopted by Conference Committee), August 24, 2011. PERA and PA 152 do not have a common purpose, nor do they relate to the same subject or matter.

Given that Act 152 and the PERA cannot be read *in pari materia*, the Union's basis for harmonizing the statutes lacks foundation. General canons of statutory interpretation dictate that the specific and more recently enacted statute controls as to any overlap between two statutes. *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28, 44; 869 NW2d 810 (2015). The Court explained this rule in *Detroit Edison*:

> It is a rule that applies only in circumstances in which some subject in dispute has been removed, or carved out from, a general category of treatment, to which it would *otherwise* belong, and placed within a more narrow category of treatment to which it belongs by specific definition, *to wit*, in those circumstances in which the statutory issue is presented in the following form: should the subject in dispute be treated in accordance with the general category to which it belongs or in accordance with the more specific category to which it also belongs? *Id.* (emphasis in original).

As set forth in the *Township's Brief on Appeal, at pp. 18-19 and 21-24*, and unrebutted by the Union, MCL 15.564(2) carves out the allocation of a public employer's medical benefit costs among its employees from the traditional mandatory bargaining process. Act 152 does so by use of the phrase "as it sees fit," thus making the allocation a *permissive* subject of bargaining as described by this Court in *Detroit Police Officers Ass'n v City of Detroit*, 391 Mich 44, 54-55, n. 6; 214 NW2d 803 (1974).

In contrast, under the Union's interpretation, rather than allocating costs "as it sees fit," every public employer would be required to bargain, negotiate, and even arbitrate the allocation of costs. Negotiation and arbitration are the opposite of discretion. This Court does not ignore the text of a statute when interpreting or applying legislative acts. *Mazur*, 497 Mich at 311

("This Court must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory.") (citations and internal quotation marks omitted).

Accordingly, it was reversible error for the court of appeals and MERC to hold that the allocation of costs under MCL 15.564(2) was a mandatory subject of bargaining in contradiction to its plain language.

II. The Township's implementation of its illustrative rate was not precluded by Act 152 or PERA.

The Court's February 3, 2017 Order granting leave asked "*whether Public Act 152, alone or in conjunction with PERA, precludes a public employer's use of illustrative insurance rates that include retiree health insurance costs*." The answer is no. By its plain terms, the expenditure limits of Act 152 do not apply to health care costs related to retired employees. MCL 15.562(e). The Union misconstrues the Court's question by focusing on a perceived harm to public employees through the use of an illustrative rate calculated with retirees' claims experience rather than addressing the Court's actual question which asks whether a public employer complies with Act 152 if it utilizes a bundled illustrative rate.

Nowhere in Act 152's language is there a provision that limits actual costs *paid by employees* toward their health care. Act 152 is only directed at limiting the expenditures of public employers. *Preamble to Act 152*; MCL 15.563(1) and 15.564(2). As such, a "violation" under Act 152 only occurs where a public employer's payments exceed the limits set forth at MCL 15.563 or 15.564. Thus, even if a public employer allegedly allocated its total annual costs for its "medical benefit plans" incorrectly, so long as its total expenditures did not exceed its limits under Section 3 or 4, it remains in compliance with Section 9 of Act 152.

The analysis is unchanged even with the inclusion of PERA. As noted by the Township and admitted by the Union, PERA is silent regarding the underlying methodology for calculating illustrative rates. *Union Brief on Appeal, p. 19*. At most, 2011 Public Act 54 ("Act 54"), MCL 423.215b,[10] suggests that the Township was required to maintain certain levels of benefits consistent with the expired collective bargaining agreement during the course of negotiations. The Township complied with this requirement; the illustrative rate for the PPO plan already in force for the Union's members ***included retirees' claims experience***. (**JA 57a, Tr., pp. 100:21-101:23**). The Union's suggestion that the Township sought to "artificially inflate employee health care costs" is nonsensical.[11] *Union Brief on Appeal at p. 19*. The Township implemented the only illustrative rate offered by its vendor, Blue Cross/Blue Shield, for the Union's members. (**JA 61a, Tr., pp. 116:19-117:9**; **JA 62a, Tr., pp. 119:16-120:6**; **JA 78a-83a)**. Moreover, even MERC agreed that Act 54 expressly permitted the Township to pass any increase in health care costs to the Union's members. Thus, other than the expenditure cap imposed by Act 152, nothing about the Union's members' health care coverage costs was altered when the Township implemented Act 152. There was no violation of PERA under these circumstances.

Act 152, alone or in conjunction with PERA, does not preclude the use of an illustrative rate that includes retirees' claims experience. It was error for MERC and the court of appeals to hold an unfair labor practice arose because the Township implemented an illustrative rate that included retirees' claims experience where use of such a rate did not violate Act 152 or PERA.

[10] Of note, the court of appeals at (**JA 489a**) cited an amendment to MCL 423.215b that was not enacted until after MERC issued its decision in this matter.

[11] Indeed, the Union representative at the ALJ Hearing admitted that the Township attempted to work with the Union prior to the filing of the unfair labor charge on alternative means to lower the health care costs for the Union's members due to the increased costs associated with implementing Act 152. (**JA 49a, Tr., pp. 66:13- 67:1**).

III. MERC exceeded its authority where it held the Township committed an unfair labor practice by not unilaterally altering its illustrative rates.

Although MERC held that the Township did not refuse to bargain (**JA 309a**), it still held that the failure of the Township to make a unilateral change to the Union's illustrative insurance rates constituted a separate unfair labor practice. (**JA 313a-315a**). As discussed in the *Township's Brief on Appeal at pp 34-38*, this holding was not only erroneous, but directly contradicts longstanding precedent and administrative standards of review. This issue is too important to labor law jurisprudence to be addressed in a perfunctory manner.

The Union does not address the merits of the error identified by the Township.[12] MERC held that the calculation and implementation of an employee's insurance premium share under Act 152 were mandatory subjects of bargaining and that no action could be taken unilaterally, but, rather, must be subject to collective bargaining. Thereafter, MERC held that the Township did, in fact, commit an unfair labor practice when it did not unilaterally recalculate and implement a revised premium share for its employees. (**JA 313a-315a**). This was clear legal error as described by the *Township's Brief on Appeal at pp. 36-37*.

Moreover, it defies commonsense. How can the Township commit an unfair labor practice by not doing something that well-settled labor law precedent prohibits?[13] MERC certainly had the authority to order the Township to recalculate its insurance rates and credit the Union's members for any overpayment; however, MERC certainly did not have the authority to hold that the Township's failure to unilaterally take this action was an unfair labor practice. Such a ruling is a labor and employment law Catch-22 – this Court consistently seeks to

[12] The Union also does not meaningfully dispute that the Township raised this issue below, such that the court of appeals incorrectly deemed the argument abandoned. *Township's Brief on Appeal at pp 34-35*.

[13] *See Macomb Co*, 494 Mich at 79.

eliminate such paradoxes from Michigan jurisprudence. See, e.g., *Southfield Police Officers Ass'n v City of Southfield*, 433 Mich 168, 185; 445 NW2d 98 (1989); *Brown v Brown*, 478 Mich 545, 564 and n. 34; 739 NW2d 313 (2007).

Regardless of this Court's ruling on any other portion of this Appeal, this Court should also reverse the court of appeals and vacate MERC's ruling on this issue and re-affirm that unilateral action on a mandatory subject of bargaining is impermissible regardless of whether the action improves or reduces employee benefits.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, Respondent/Appellant Shelby Township respectfully requests this Court reverse the Court of Appeals December 15, 2015 Opinion and Order in its entirety. Further, the Township requests this Court reverse the portions of MERC's August 18, 2014 Decision and Order that found that the Township's actions were not permissible under Act 152 and in violation of PERA, and remand this matter to MERC with instructions to dismiss the Unfair Labor Practice Charges of the Union in their entirety.

Respectfully submitted,

KIRK, HUTH, LANGE
& BADALAMENTI, P.L.C.

/s/ Craig Lange
By: Craig W. Lange (P27200)

/s/ Robert T. Carollo, Jr.
By: Robert T. Carollo, Jr. (P76542)

/s/ Ryan J. L. Fantuzzi
By: Ryan J. L. Fantuzzi (P79616)
19500 Hall Road, Suite 100
Clinton Township, Michigan 48038
(586) 412-4900

Dated: June 14, 2017